

Claimant requested the Appeals Board to review the single issue of whether the Administrative Law Judge erred in denying claimant an award of permanent partial general disability benefits pursuant to K.S.A. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, and considering the briefs of the parties, the Appeals Board finds as follows:

Respondent stipulated to all the essential facts of this workers compensation claim, including that claimant as a result of his August 28, 1995, work-related accident, sustained a 17 percent functional impairment of his left lower leg. Respondent, however, argues that claimant is limited to an award of only medical compensation as required by the provision of K.S.A. 44-501(c) in effect on claimant's date of accident. That statute provided in pertinent part as follows:

Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

K.S.A. 44-501(c) was recently interpreted by the Kansas Court of Appeals in the case of Boucher V. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, rev. denied 260 Kan. ____ (1996). The claimant in Boucher was injured in a work-related automobile accident. Claimant's injuries eventually required medical treatment and also resulted in a permanent functional disability. However, claimant was not disabled for a period of at least one week from earning full wages while working for respondent. The court limited claimant's award to medical expenses, holding that K.S.A. 44-501(c) was plain and unambiguous and, therefore, claimant was disqualified from an award of workers compensation benefits except for medical compensation. 21 Kan. App. 2d at 983.

The 1996 Kansas Legislature immediately responded to the Boucher decision by deleting the operative language which limits an employee's recovery in a workers compensation case to medical compensation where the employee has not missed a week of work. This amendment also included language that made the amendment retroactive for all cases not fully adjudicated on the effective date of the amendment, April 4, 1996. See K.S.A. 1996 Supp. 44-501(c) and K.S.A. 1996 Supp. 44-501a. Thus, the amendment would have applied to this case.

However, in a case that challenged the retroactive application of the amendment, the Kansas Court of Appeals held that the amendment could not be applied retroactively because it was substantive in nature and affected the vested rights of the employer. See

Osborne V. Electric Corporation of Kansas City, 23 Kan. App. 2d 868, 932 P.2d 297, rev. denied 262 Kan. ____ (1997). Therefore, in the present case, the question presented for the Appeals Board to review is whether claimant established by a preponderance of the credible evidence that he was disabled from working for respondent for at least one week from earning full wages.

The Administrative Law Judge found claimant had failed to prove that his left ankle injury disabled him from earning full wages for at least one week for respondent, and thus limited claimant's award to medical expenses attributable to the injury, unauthorized medical expenses, and future medical treatment upon application to the Director.

Claimant contends that he presented credible evidence in the record that proves he was unable to work from October 19, 1995, through November 5, 1995, a total of 17 days as the result of his work-related August 28, 1995, injury. Accordingly, claimant argues that K.S.A. 44-501(c) does not apply and he is, therefore, entitled to permanent partial disability benefits based on the stipulated 17 percent permanent functional impairment of his left lower leg.

Claimant injured his left ankle while he was working for respondent in Chicago, Illinois. Respondent provided medical treatment for the injured ankle at Loyola University Medical Center. Claimant received medical treatment for his injured left ankle on the day of his injury through Loyola University Medical Center emergency department. Claimant was subsequently seen by Rodney M. Stuck, D.P.M., for further treatment of his injured ankle on five occasions, the last visit being October 5, 1995.

Claimant was first placed in a posterior splint and instructed to utilize crutches in order to have no weight bearing on the left ankle. Dr. Stuck's medical record of October 5, 1995, emphasized claimant's need to continue wearing an ankle brace, limited claimant's lifting activities to no more than 25 pounds for 3 more weeks, prescribed physical therapy for the injury when claimant returned to Kansas, and recommended claimant seek further medical treatment if the ankle injury was not resolved within 6 weeks.

The Administrative Law Judge concluded that the medical records from Loyola University Hospital in Chicago did not direct claimant not to work from October 19, 1995, through November 5, 1995. The Administrative Law Judge also concluded that the record simply was silent as to whether or not claimant was paid full wages for that period. The Appeals Board disagrees with those conclusions and the award made by the Administrative Law Judge.

The Appeals Board finds that claimant's testimony coupled with the medical treatment records and the stipulations of the parties prove that claimant was unable to work from October 19, 1995 through November 5, 1995, because of his work-related left ankle injury. Specifically, the Appeals Board finds that the trier of fact is not bound by the medical

evidence presented in the case and has the responsibility of making its own determination on the issue of claimant's disability. See Tovar V. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). In the present case, claimant presented uncontradicted testimony that he could not work, during the period at issue, because of his work-related left ankle injury. Respondent did not contradict this testimony nor did respondent prove that the testimony was untrustworthy. Therefore, this evidence cannot be disregarded. See Anderson V. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Additionally, the Appeals Board finds that the medical treatment records entered into evidence by stipulation indicated claimant had received a severe left ankle injury. At the time claimant was last seen by Dr. Stuck on October 5, 1995, claimant remained in a brace, had limits on his lifting activities, had further treatment recommended in the form physical therapy, and was instructed to obtain further medical treatment if his left ankle injury had not resolved in six weeks. The Appeals Board also concludes that the severity of claimant's ankle injury is further substantiated by the parties stipulating that as a result of claimant's injury he sustained a 17 percent permanent functional impairment.

The Appeals Board finds that the record of evidence, taken as a whole, proves that claimant was unable to perform his working activities for respondent from October 19, 1995, through November 5, 1995. Therefore, the provision contained in K.S.A. 44-501(c) that limits claimant's entitlement in a workers compensation case to medical compensation does not apply. Accordingly, claimant is entitled to permanent partial disability benefits based on the stipulated 17 percent permanent partial impairment of his left lower leg.

The Administrative Law Judge also had before her the issue of whether claimant was entitled to temporary total disability compensation for the period from October 19, 1995, through November 5, 1995. However, the claimant did not raise that issue in his application for review before the Appeals Board. Furthermore, claimant, in his brief before the Appeals Board, indicated he would have been entitled to 1.43 weeks of temporary total disability compensation, if such compensation had been claimed. However, claimant indicated that temporary total disability compensation was not claimed and, therefore, the award of permanent partial disability compensation should be based on 17 percent of the left lower leg and the schedule contained in K.S.A. 44-510(d)(a)(15).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample, dated June 20, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steven H. Overstreet and against the respondent, Mid-West Conveyor Co., Inc., and its

insurance carrier, Insurance Company State of Pennsylvania, for an accidental injury which occurred on August 28, 1995.

Claimant is entitled to 32.30 weeks of permanent partial disability benefits at the weekly rate of \$326 for a 17 percent permanent partial disability of the lower leg, making a total award of \$10,529.80.

As of September 25, 1997, the entire award is due and is ordered paid in one lump sum less amounts previously paid.

Further award is made entitling claimant to past medical expenses from respondent's insurance carrier for the injury suffered on August 28, 1995.

Claimant is further entitled to unauthorized medical expenses up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical treatment is awarded upon application to and approval by the Director.

The Appeals Board finds that claimant's attorney fee contract is acceptable so long as it is not in contravention of the K.S.A. 44-536.

The fees necessary to defray the expense of the administration of workers compensation act for the state of Kansas are assessed against respondent and its insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	\$75.55
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IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned board member dissents from the opinion of the majority in this matter. The majority found that claimant presented uncontradicted evidence that he could not work during the period of October 19, 1995, through November 5, 1995, thus avoiding the limitations set forth in K.S.A. 44-501(c) as recently interpreted by the Kansas Court of Appeals in Boucher V. Peerless Products, Inc., supra. In this instance, claimant was not precluded from working as the result of any medical limitations but, instead, decided on his own that he was unable to perform his work duties. The October 5, 1995, medical report from Dr. Stuck indicates that claimant had reach maximum medical improvement and was returned to work with specific limitations. Claimant was told to seek additional medical treatment if the ankle problem did not resolve within six weeks, but claimant sought no additional medical care.

To allow a claimant to remove himself from work based upon his own reluctance to perform his job duties, without supporting medical evidence, would cause K.S.A. 44-501(c) to be inapplicable, based purely upon a claimant's decision to perform or not perform his or her job duties. This would effectively render that provision of K.S.A. 44-510(c) impotent.

The language of the statute requires that claimant be disabled for a period of at least one week from earning full wages. Webster's II New College Dictionary, page 322, (1995), defines disabled as to "make motionless or powerless by damage or injury." The evidence in the record supports a finding that while claimant might have been reluctant to work during the period in question, there is no indication from a medical standpoint that claimant was disabled during the period of October 19, 1995, through November 5, 1995. As such, I would apply the limitations as set forth in K.S.A. 44-510(c) and limit claimant's award to medical compensation.

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Mark E. Kolich, Kansas City, KS
Gary R. Terrill, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director